STATE OF MICHIGAN

COURT OF APPEALS

LULA ELEZOVIC,

Plaintiff-Appellant/Cross Appellee,

and

JOSEPH ELEZOVIC,

Plaintiff,

v

DANIEL P. BENNETT,

Defendant-Appellee/Cross Appellant,

and

FORD MOTOR COMPANY,

Defendant.

FOR PUBLICATION
January 25, 2007
9:00 a.m.

No. 267747
Wayne Circuit Court
LC No. 99-934515-NO

Official Reported Version

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

CAVANAGH, P.J.

This appeal follows the remand of this matter to the circuit court by our Supreme Court[1] for consideration of plaintiff Lula Elezovic's sexual harassment claim premised on a hostile work environment theory, MCL 37.2103(i)(*iii*), against her former supervisor, defendant Daniel Bennett, only.[2] On remand, the circuit court granted defendant's motion for summary disposition on the ground that, under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., defendant was not functioning as an "agent" of the Ford Motor Company when he committed the charged acts of sexual harassment. Plaintiff appeals this decision. Defendant cross-appeals by delayed

[1] *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005).

[2] Daniel Bennett will be referred to as "defendant" in this opinion.

leave granted, challenging the trial court's denial of his renewed pretrial motion for summary disposition of plaintiff 's hostile work environment claim on its merits.

Because the facts related to this matter have been extensively detailed in previous opinions, we reiterate only the salient facts here. See *Elezovic v Ford Motor Co*, 472 Mich 408, 411-418; 697 NW2d 851 (2005); *Elezovic v Ford Motor Co*, 259 Mich App 187, 190-191; 673 NW2d 776 (2003). Plaintiff was an hourly production worker at Ford's Wixom assembly plant when she was allegedly sexually harassed by defendant, her supervisor. She brought sexual harassment claims against both Ford and defendant. Following a three-week jury trial, the trial court granted defendants' motion for a directed verdict, holding that plaintiff failed to establish a prima facie case of sexual harassment against either Ford or defendant.

On appeal, this Court affirmed the trial court's decisions. With regard to defendant, this Court relied on the then-recent case of *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 485; 652 NW2d 503 (2002), which held that a supervisor may not be held individually liable for violating the CRA. *Elezovic*, *supra*, 259 Mich App at 197, 202. Our Supreme Court granted leave to appeal, and affirmed with regard to the issue of Ford's liability. *Elezovic*, 472 Mich at 430. However, the Court overruled the *Jager* holding, concluding that an agent who sexually harasses an employee in the workplace can be held individually liable under the CRA. *Id*. at 411. The Court remanded the matter to the circuit court for further proceedings regarding defendant. *Id*. at 431. As noted above, on remand, the circuit court granted defendant's renewed motion for summary disposition on the ground that defendant was not functioning as an "agent" of Ford when he committed the charged acts of sexual harassment. This appeal followed.

Plaintiff argues that the trial court erred in concluding that defendant was not functioning as an "agent" of Ford under the CRA when he committed the charged acts of sexual harassment and, thus, could not be held individually liable. We agree.

This Court reviews de novo the ruling on a motion for summary disposition. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Although the trial court did not specify under which subrule of MCR 2.116(C) it found summary disposition appropriate, because the court looked beyond the pleadings, it appears that the decision was premised on MCR 2.116(C)(10). MCR 2.116(C)(10) tests the factual support of a claim and requires this Court to consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact warranting a trial exists. *Walsh*, *supra*.

This Court also reviews de novo issues of statutory interpretation. *Bloomfield Twp v Oakland Co Clerk*, 253 Mich App 1, 9; 654 NW2d 610 (2002). Our purpose in reviewing questions of statutory construction is to discern and give effect to the Legislature's intent. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). We begin our analysis by examining the plain language of the statute. If the language is unambiguous, no judicial construction is required or permitted and the statute must be enforced as written. *Id*., quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). The undefined words of a statute must be given their plain and ordinary meaning, which may be ascertained by looking at dictionary definitions. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

The CRA is remedial and thus must be "liberally construed to suppress the evil and advance the remedy." *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988). One of the purposes of the CRA, specifically MCL 37.2202, is to eradicate particular forms of discrimination in the workplace. See *Champion v Nation Wide Security, Inc*, 450 Mich 702, 713; 545 NW2d 596 (1996). "MCL 37.2202 forbids *any* employer from engaging in acts of discrimination that are prohibited by the CRA." *McClements v Ford Motor Co*, 473 Mich 373, 386; 702 NW2d 166, amended 474 Mich 1201 (2005) (emphasis in original). One form of discrimination the CRA prohibits is discrimination based on sex. MCL 37.2202(1). Thus, an employer shall not discriminate on the basis of sex, which includes sexual harassment. MCR 37.2202(1)(a), 37.2103(i). The CRA is the exclusive remedy for a claim based on sexual harassment. *McClements, supra* at 383.

There are two categories of sexual harassment: (1) quid pro quo and (2) hostile work environment. See *Chambers v Trettco, Inc*, 463 Mich 297, 310-311; 614 NW2d 910 (2000). At issue in this case is the latter type, hostile work environment sexual harassment, which is defined to include

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
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> * * *
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> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment. [MCL 37.2103(i).]

When the hostile work environment is created by the actions of coworkers and other coemployees, the alleged victim seeking a remedy under the CRA must file a claim of hostile work environment sexual harassment against her[3] employer on a vicarious liability theory. See, e.g., *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 791-792; 685 NW2d 391 (2004). Thus, to establish a prima facie case of hostile work environment sexual harassment, the plaintiff employee must prove (1) that she belonged to a protected group; (2) that she was subjected to communication or conduct on the basis of sex; (3) that she was subjected to unwelcome sexual conduct or communication; (4) that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with her employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. See *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). Respondeat superior liability exists when an employer has adequate notice of the harassment and fails to take appropriate corrective action. See *Chambers*, *supra* at 318-319.

[3] We use gender-specific pronouns in this opinion merely for convenience; obviously, the legal principles involved would be equally applicable were the genders reversed.

However, "if an *employer* is accused of sexual harassment, then the respondeat superior inquiry is unnecessary because holding an employer liable for personal actions is not unfair." *Radtke*, *supra* at 397 (emphasis in original). Thus, when the hostile work environment is created by the actions of the employer, the alleged victim seeking a remedy under the CRA may file such a claim against her employer premised on a direct theory of liability. Similarly, this case involves not *vicarious liability* but the individual liability of the alleged sexual harasser, who is a purported "agent" of the employing entity, not a coworker.

In this case, defendant argued in the trial court on remand that plaintiff's case had to be summarily dismissed because defendant was never vested with authority to create a sexually hostile work environment; i.e., defendant "was not Ford's agent for purposes of creating a sexually hostile work environment." The trial court agreed with defendant, granting defendant's motion for summary disposition on the ground that defendant was not functioning as an agent at the time he committed the alleged unlawful acts of discrimination. We conclude that both defendant and the trial court misconstrued the applicable legal principles of agency. This unjust and unreasonable result permits an agent to pursue and accomplish his illegal objective by using his position and power, but immunizes him from liability because he was not supposed to do that. In other words, in this case, defendant could not be held personally liable for violating the purported victim's civil rights because Ford did not tell him to sexually harass her. We do not believe that the Legislature intended this incongruous result.

Article 2 of the CRA defines an "employer" as "a person who has 1 or more employees, and includes an agent of that person."[4] MCL 37.2201(a). Our Supreme Court, in this case, declared that an agent of an employer is considered an "employer" for purposes of the CRA, holding

> [W]hen a statute says "employer" means "a person who has 1 or more employees, and *includes an agent of that person*," it must, if the words are going to be read sensibly, mean that the Legislature intended to make the agent tantamount to the employer so that the agent unmistakably is also subject to suit along with the employer. (Emphasis added.) Indeed, when we said in *Chambers* [*v Trettco, Inc*, 463 Mich 297, 320; 614 NW2d 910 (2000)], that categorizing a given pattern of misconduct allows the Court "to determine whether the sexual harasser's *employer*, in addition to the sexual harasser *himself*, is to be held responsible for the misconduct," we believe we said as much. (Emphasis in original.) Accordingly, we reject the argument that including "agent" within the definition of "employer" serves only to provide vicarious liability for the agent's employer and we conclude that it also serves to create individual liability for an employer's agent. [*Elezovic*, 472 Mich at 420.]

The Court also specifically held that:

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[4] "[W]hen a statute specifically defines a given term, that definition alone controls." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996).

> Because we find that (1) inclusion of an "agent" within the definition of the word "employer" is not limited to establishing vicarious liability for the agent's employer, but in fact means agents are considered employers, (2) federal decisions construing Title VII should not be followed because it would lead to a result contrary to the text of our CRA, and (3) the amendment history of the CRA does not preclude a finding of individual liability, we conclude that liability under our CRA applies to an agent who sexually harasses an employee in the workplace. [*Id*. at 426.]

Again, our Supreme Court reiterated in its conclusion that "[b]ecause employers can be held liable under the CRA, and because agents are considered employers, agents can be held liable, as individuals, under the CRA." *Id*. at 431.

The clear result of the Supreme Court's conclusion is that if the purported harasser is an agent of the employing entity, the harasser is treated as if he *is* the employer for purposes of the CRA. In other words, the harasser may be held directly and individually liable if he engaged in discriminatory behavior in violation of the CRA while acting in his capacity as the victim's employer. Therefore, a respondeat superior analysis is not necessary with respect to the agent's direct and individual liability because this is not a claim of vicarious liability. See *Chambers*, *supra* at 311; *Radtke*, *supra*.

Next, we must determine when one is considered an "agent" and, thus, an employer under the CRA. The CRA does not define the term "agent," so we may turn to a dictionary for guidance on its plain and ordinary meaning. See *Koontz*, *supra*. An agent is "a person or business authorized to act on another's behalf" and "a person or thing that acts or has the power to act." *Random House Webster's College Dictionary* (1997). And, if "agent" is considered a legal term, its meaning is the same: "[o]ne who is authorized to act for or in place of another." Black's Law Dictionary (7th ed). These definitions are consistent with general agency principles, *Stephenson v Golden (On Rehearing)*, 279 Mich 710, 734-735; 276 NW 849 (1937), and the fact that "most employers are corporate entities that cannot function without delegating supervisory power." *Champion*, *supra* at 713. We conclude that it is through this delegation of general supervisory power and authority that one becomes an "agent" of the employing entity and, thus, an employer within the context of the CRA.

Specifically, persons to whom an employing entity delegates supervisory power and authority to act on its behalf are "agents," as distinguished from coemployees, subordinates, or coworkers who do not have supervisory powers or authority, for purposes of the CRA. If this agent is also the alleged sexual harasser, the agent is considered an employer under the CRA and may be directly and individually liable for this tort against the victim, whether or not the employing entity is liable. Again, MCL 37.2202 prohibits *any* employer from engaging in acts of discrimination that are prohibited by the CRA. *McClements*, *supra* at 386.

Contrary to defendant's argument, the trial court's holding, and the dissent in this case, it is not necessary for a plaintiff to establish that a defendant was "functioning as an agent" when he committed the charged specific acts of sexual harassment. Almost invariably, the harasser is never acting within the scope of his agency when he breaks the law by sexually harassing a subordinate. As our Supreme Court has noted, "an employer rarely authorizes an agent to break

the law or otherwise behave improperly . . . ." *Champion, supra* at 712 n 7. The issue is not whether the harassing acts were within the scope of the agent's authority—the plaintiff is not attempting to hold the principal liable for the agent's acts. The issue is whether the harasser was an agent, one vested with supervisory power and authority, at the time the harassing acts were being perpetrated against the victim; if so, the harasser is considered an employer for purposes of the CRA.

We disagree with the dissent's contention that the common-law agency principles on which the Court relied in *Chambers, supra* at 311, "in determining when an employer is liable for sexual harassment committed by its employees," is relevant in this case that does *not* involve vicarious liability. The dissent's reliance on other cases involving claims of vicarious liability is not persuasive. The dissent's claim that we have altered "the elements necessary to establish a prima facie case of hostile work environment sexual harassment by eliminating the respondeat superior requirement" is accurate, but only with respect to claims of direct liability. First, sexual harassment is an intentional tort. *McClements, supra* at 381-382. Thus, when the claim of sexual harassment against an employer is for direct liability, and not vicarious liability, intent need not be inferred through a respondeat superior analysis, i.e., it need not be established that the employer had reasonable notice of the alleged harassment and failed to adequately investigate and remedy the situation because the employer *committed* the harassment. See *Radtke, supra* at 396-397, quoting *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). Second, as discussed above, our Supreme Court in *Radtke, supra* at 396, held that "if an *employer* is accused of sexual harassment, then the respondeat superior inquiry is unnecessary . . . ." *Id*. at 397 (emphasis in original).

The harassing agent, then, is held to the same standard as an employer; employers shall not discriminate against employees. We note Justice Weaver's concern in her partial dissent with regard to the issue of holding agents, like supervisors, who sexually harass liable for their conduct, while not holding coemployees liable for similar harassing actions. *Elezovic, supra*, 472 Mich at 437. But we conclude that agents who harass should not be treated in the same manner as coemployees who harass because agents are not similarly situated to coemployees. For example, agents have influence and power over their victim that coemployees do not enjoy, such as control over their victim's employment circumstances and opportunities like promotions, bonuses, overtime options, raises, shift and job assignments, and terminations. In other words, in significant part, these agents are the employers. It is for these reasons, as well as many others, that the victim is placed in the no-win situation of risking her livelihood by reacting to or reporting the unlawful behavior, or accepting the harassment when that harassment is perpetrated by a supervisor. The harasser, left unchecked, is then empowered to escalate the behavior so that sexual harassment becomes a condition of employment, using the fear of economic or other reprisal as a persuasive threat. This is the force of evil that the CRA has attempted to eradicate.

As our Supreme Court previously noted,

> [s]exual harassment was targeted by the Civil Rights Act because it is both "pervasive" and "destructive, entailing unacceptable personal, organizational, and societal costs."

* * *

> "Sexual harassment should be explicitly defined and prohibited because it is a demeaning, degrading, and coercive activity directed at persons on the basis of their sex, the continuation of which is often contingent on the harasser's economic control over the person being harassed. It should be outlawed because it violates basic human rights of privacy, freedom, sexual integrity and personal security." [*Radtke, supra* at 380-381, quoting House Legislative Analysis, HB 4407, August 15, 1980.]

Agents have been granted supervisory powers that do not, and should not, come without the concomitant responsibility attendant to such powers. They are, for all intents and purposes, the employing entity's front-line defense against this type of unlawful behavior occurring in the workplace. When an agent instead becomes the sexual harasser, immunity from the reach and teeth of the CRA should not be the reward. The Legislature's intent is clear—the eradication of sexual harassment as a destructive and hazardous condition in the workplace. Employers, including agents, share the burdens and the benefits of meeting the requirements of the CRA. The effect of the narrow construction posited by defendant in this case, as well as the trial court and the dissent, is to insulate the tortfeasor agent from personal accountability for his role in creating the very conditions the CRA was enacted to prevent under the guise of his "agent" capacity, which he flouted when he chose to engage in such acts. This position is untenable—an agent is an agent whether he is abiding by or breaking the law.

This conclusion is consistent with prevailing law related to torts committed by agents. "It is a familiar principle that the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort." *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968); see, also, *Hartman & Eichhorn Bldg Co, Inc v Dailey*, 266 Mich App 545, 549; 701 NW2d 749 (2005). And "'a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation.'" *People v Brown*, 239 Mich App 735, 739-740; 610 NW2d 234 (2000), quoting *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). See, also, 3 Am Jur 2d, Agency, § 298, p 668. Thus, it is clear that such agents are personally liable for unlawful conduct committed in their capacity as agents.

Our holding is also consistent with the rule that remedial statutes like the CRA are to be construed liberally "to suppress the evil and advance the remedy." *Eide, supra* at 34. The evil here is discrimination, particularly sexual harassment, in the workplace. See *Champion, supra* at 713. With regard to the imposition of vicarious liability in the case of sexual harassment, our Supreme Court rationalized that "when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority." *Id*. at 712. That rationale is even more cogent with regard to the imposition of personal liability against the tortfeasor agent who accepted the delegated supervisory power only to use it to demean, degrade, and coerce his subordinates on the basis of their sex. See *Radtke, supra* at 381, quoting House Legislative Analysis, HB 4407, August 15, 1980. Allowing the tortfeasor agent to violate the CRA without legal consequence "will do little, if anything, to eradicate discrimination in the workplace." See *Champion, supra* at 713.

In summary, under the CRA, an "employer" includes an agent of the employing entity. "Agents" are persons to whom the employing agency delegates supervisory power and authority over subordinates. An agent can be held directly and individually liable if he engaged in discriminatory behavior in violation of the CRA while acting in his capacity as the victim's employer. Therefore, if plaintiff can establish a prima facie case of hostile work environment sexual harassment against defendant, her supervisor, absent the respondeat superior requirement, she may be found entitled to damages for which defendant is individually liable. Therefore, the trial court's grant of defendant's motion for summary disposition on the ground that defendant was not functioning as an agent of Ford when he committed the charged acts of sexual harassment is reversed.

On cross-appeal, defendant argues that the trial court erred in denying his motion for summary disposition of plaintiff's hostile work environment sexual harassment claim because her sexual allegations were insufficient as a matter of law. Again, we disagree.

To establish a prima facie case of sexual harassment based on a hostile work environment against her employer, plaintiff had to establish (1) that she was a member of a protected group, (2) that she was subjected to communication or conduct on the basis of sex, (3) that she was subjected to unwelcome sexual conduct or communication, and (4) that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with her employment or created an intimidating, hostile, or offensive work environment. *Radtke*, *supra* at 382. Defendant claims that plaintiff failed to establish the fourth element.

"[W]hether a hostile work environment existed shall be determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Id*. at 394. Plaintiff presented evidence that, from November of 1996 when defendant became her supervisor through approximately the summer of 1999, (1) defendant would frequently look at plaintiff and lick his lips in a sexually suggestive manner, (2) defendant would frequently grab his crotch and ask plaintiff to perform oral sex on him, (3) defendant asked plaintiff if her "boobs" were real and told her that he would like to stick his "dick" between them (but this may have occurred outside the period of limitations), (4) there were three or four instances where defendant was "playing with himself" and, at least once, said "lick it Lula, lick it," (5) defendant called plaintiff a "bitch" at least once, (6) defendant grabbed plaintiff's arm as she was leaving a restroom and said "can we go inside and I'll wipe," (7) defendant placed his hand on his groin and asked, "You want some, you want some, you want some?" and (8) defendant went to an unoccupied room where plaintiff was using the phone and "played with himself" while saying, "You want some of this" and "That makes you feel good."

Objectively examining the totality of the circumstances, a reasonable person could conclude that defendant's conduct was unreasonable, i.e., it was hostile, intimidating, or offensive. See *Radtke*, *supra* at 386-387. Although we recognize that plaintiff was unable to give specific dates and times with regard to many of the instances of claimed sexual harassment, she has established, at least, a genuine issue of material fact regarding whether she was subjected to a hostile work environment as a consequence of defendant's conduct. See *Quinto v Cross & Peters Co*, 451 Mich 358, 369-370; 547 NW2d 314 (1996); *Radtke*, *supra*.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

Smolenski, J., concurred.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski